Supreme Court, U.S.
FILED
SEP 17 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-396

LUIS MARTI,

Petitioner,

—v.—

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PATRICK M. WALL
36 West 44th Street
New York, New York 10036
Counsel for Petitioner

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IN THE

Supreme Court of the United States

October Term, 1971

No.

LUIS MARTI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Luis Marti, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, affirming his conviction in the United States District Court for the Southern District of New York of conspiracy to transport and transportation of obscene matter in interstate commerce, in violation of 18 U.S.C. §§ 371 and 1465.

Opinion Below

The opinion of the Court of Appeals, not yet officially reported, is printed in the Appendix to this petition.

Jurisdiction

The judgment of the Court of Appeals was entered on July 7, 1971. A timely petition for rehearing en banc was denied by an order entered August 18, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Whether, despite *Costello* v. *United States,* 350 U.S. 359 (1956), the First Amendment forbids a federal grand jury to brand, as obscene, material which it has never viewed, but which has been merely described to it by the hearsay testimony of law enforcement officers.

2. Whether the Confrontation Clause of the Sixth Amendment and long established federal evidentiary standards are violated when a jury is permitted to hear certain prejudicial statements about a defendant allegedly made to Government witnesses by a non-testifying co-defendant.

3. Whether petitioner's rights under the First Amendment and under the Due Process Clause of the Fifth Amendment were violated by the trial court's refusal to permit the defense to show that magazines and films similar or identical to those involved in the case were freely available in various parts of the United States. Included herein are two related questions, namely:

> a) whether a defendant in an obscenity case may introduce proof that material similar or identical to that for which he is on trial is freely available in major metropolitan areas throughout the country without showing further that it is also available in other, non-urban, areas; and

b) whether, in such a case, proof of free availability of similar or identical material in numerous metropolitan areas throughout the country is admissible in the absence of expert testimony that it enjoys a reasonable degree of community acceptance.

Statement of the Case

Petitioner was indicted, with fourteen others, in five counts of a thirteen-count indictment charging a conspiracy to transport obscene material in interstate commerce in violation of 18 U.S.C. §1465 and substantive violations of that statute.[1] After trial in the United States District Court for the Southern District of New York before Hon. Lloyd F. MacMahon and a jury, he was convicted under the conspiracy count and under one substantive count which charged him with transporting approximately 1,000 reels of obscene film from New York City to Baltimore, Maryland. On trial with him was one Richard Portela, a co-defendant who did not testify.

At trial, various Government witnesses, who were self-confessed members of the conspiracy, were permitted to relate what Portela had told them about petitioner and petitioner's connection with the conspiracy. Among the statements which Portela was said to have made were: (1) that the conspirators obtained their films from petitioner; (2) that petitioner was the only producer of "hard

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[1] Petitioner had vainly sought, prior to trial, information as to whether any of the obscene films with which he was allegedly connected had even been viewed by the grand jury. It was disclosed for the first time, on appeal, that no such viewing had taken place, but that the nature of the films had been described to the grand jury by the hearsay testimony of law enforcement officers.

core" color films in Manhattan; and (3) that petitioner supplied the obscene films which had been seized in Baltimore, and which formed the basis of the sole substantive count under which petitioner was convicted. This last statement was made after both the witness (one James Kelly) and Portela had been arrested in Baltimore and arraigned in state court on a charge of possessing those films.

Reasons for Granting the Writ

1. Petitioner was sentenced to prison under two counts which had, as their basis, his connection with films which the grand jury had never seen, having heard only a hearsay description of those films given by law enforcement officers.

In *Costello* v. *United States*, 350 U.S. 359 (1956), this Court rejected an argument that a federal indictment based on hearsay is invalid. Since then, the use of hearsay before federal grand juries has created a number of problems.[1] No such problem, however, is so great as the one which this petition now raises. The holding below—that a grand jury may find an indictment on obscenity charges without ever having seen the material in question—is, so far as our research shows, the first such ruling by any appellate court, state or federal.[2] That holding has opened a Pandora's box,

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[1] See, e.g., such cases as: *United States* v. *Umans*, 368 F. 2d 725 (2d Cir. 1966), *cert. granted*, 386 U.S. 940, *cert. dismissed as improvidently granted*, 389 U.S. 80 (1967); *United States* v. *Arcuri*, 282 F. Supp. 347 (E.D.N.Y. 1968).

[2] The sole analogous case which has been found is *People* v. *Aday*, 226 Cal. App. 2d 520, *cert. denied*, 379 U.S. 931 (1964) which upheld a state obscenity indictment even though the grand jury had not heard evidence of contemporary community standards. We make no claim here that the grand jury should have heard such evidence, and we note that, in *Aday*, the California court was careful to point out that the material branded obscene had been read, in its entirety, to the grand jury.

the lid of which should now be shut tightly and forever locked by this Court.

The crucial difference between the case and the many which we fear will follow it is to be the case heard and Costello on the other, is the premature use of the First Amendment. After relating what had happened before the Costello grand jury, this Court stated that "the First Amendment requires nothing more" [R. 7-8 at 8]. The question posed here is whether in cases of alleged obscenity, the First Amendment "requires nothing more." We submit that it requires at the very least that the grand jury actually see what it intends to censor.

This Court has long been proud to strike down not only those laws and procedures which directly violate the rights preserved by the First Amendment but also those devices which have a "chilling effect" upon the free exercise of those rights. Surely an entertainment group is more vulnerable to have such an effect upon the free dissemination of books, magazines and films than the filing of an indictment against the dissemination. The First Amendment rights of those engaged in various forms of expression are placed in constant jeopardy if a grand jury may indict under obscenity laws on the mere abstract testimony of a law enforcement officer that the particular item involved is obscene.[3]

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[3] A seizure of film and book under a search warrant issued by a judge who had merely been informed by an enforcement officer that the objects sought were "obscene" or who had merely been given a vague description of them would surely fail to pass Constitutional muster [cf. e.g. Marcus v. Search Warrant, [R. 7-8 at 8]]. It may well emphasize the issuing judge would merely be given notice of the supposedly offensive material. Although Mr. Justice Frankfurter valued while we now take value under the First Amendment the two situations are analogous.

Numerous criminal charges are brought each year against persons dealing in magazines, novels, films and other forms of expression. That many of those cases are ultimately determined to be baseless after test in a court of law amply demonstrates the fallible judgment of those who initiated the charges. There is no way to determine how many of those ultimately vindicated were driven out of business by the very making of the charge or by the expenses incurred in defending against it. We note, moreover, that police and prosecutorial views as to what constitutes obscenity is often not even close to contemporary community standards.[4]

Whether one who deals in material possibly protected by the First Amendment may lawfully be put to trial (and possibly out of business) by an indictment found by grand jurors who never even glimpsed what they voted obscene is a question which should be resolved by this Court. If not forbidden by the First Amendment, such a practice should be stopped by this Court in the exercise of its supervisory powers. Like Mr. Justice Stewart, where possible obscenity is involved, a grand jury cannot know it unless it sees it. See *Jacobellis* v. *Ohio,* 378 U.S. 184, 197 (1964) (concurring opinion of Stewart, J.).

2. There is an obvious and direct relationship between the hearsay rule and the Confrontation Clause of the Sixth Amendment. See, e.g.: *Pointer* v. *Texas,* 380 U.S. 400 (1965)); *Bruton* v. *United States,* 391 U.S. 123 (1968) In *Bruton,* it was stated that "there is not before us . . . any recognized exception to the hearsay rule insofar as peti-

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[4] See Note, Extralegal Censorship of Literature, 33 N.Y.U.L. Rev. 989 (1958), cited with approval in *Bantam Books, Inc.* v. *Sullivan,* 372 U.S. 58, 67 n.7 (1963).

tioner is concerned and we intimate no view whatever that such exceptions necessarily raise questions under the Confrontation Clause." 391 U.S. at 128 n.3. This petition presents the question left unanswered there—to what extent and under what limitations may one particular recognized exception to the hearsay rule co-exist with the Confrontation Clause.

The exception involved here is that which permits the Government to introduce against all members of a conspiracy the declarations of a co-conspirator. The limitations of that exception were stated thusly in *Lutwak* v. *United States,* 344 U.S. 604, 617 (1953):

> Declarations of one conspirator may be used against the other conspirator not present on the theory that the declarant is the agent of the other, and the admissions of one are admissible against both under a standard exception to the hearsay rule applicable to a party.... *But such declarations can be used against the co-conspirator only when made in furtherance of the conspiracy.* (Emphasis added).

This Court has made similar statements on many occasions.[5]

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[5] See, e.g., *Dutton* v. *Evans,* 400 U.S. 74, 81 (1970), where the general rule was stated in these words:

> It is settled that in federal conspiracy trials the hearsay exception that allows evidence of an out-of-court statement of one conspirator to be admitted against his fellow conspirators applies only if the statement was made in the course of and in furtherance of the conspiracy ....

See also: *Logan* v. *United States,* 144 U.S. 263, 309 (1892) ("But only those . . . declarations are admissible under this rule, which are made while the conspiracy is pending, and in furtherance of its object."); *Fiswick* v. *United States,* 329 U.S. 211, 217 (1946); *Krulewitch* v. *United States,* 336 U.S. 440, 442 (1949) ("This prerequisite to admissibility, that hearsay statements by some conspirators to be admissible against others must be in furtherance of the conspiracy charged has been scrupulously observed by federal courts.")

The protections which the Confrontation Clause affords one caught in the web of a conspiracy trial will expand or contract in direct proportion to how narrowly or broadly the term "furtherance of the conspiracy" is defined by those who have the power to define it.[6] The meaning and scope of this magic phrase have never been definitively passed upon by this Court, and the opinions of the various Courts of Appeals present a bewildering array of interpretations reaching concrete results upon no very clear general principle.[7]

No prosecutor worth his salt is so bereft of imagination as to be unable to spin out a theory upon which any given statement by a co-conspirator might be said to further the conspiracy then on trial. We may be wrong, but we find it difficult to accept the proposition that the meaning of the Confrontation Clause and the rules of evidence should depend, in any given case tried in this country, upon how glib may be the tongue and how fertile the imagination of the prosecutor who tries it.

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[6] He who defines the terms will win the argument. When the "mere evidence" rule of *Gouled* v. *United States*, 255 U.S. 298 (1921), was still ostensibly in effect, those courts which interpreted it employed such tortuous reasoning in defining "mere evidence" that the rule had been in its grave years before this Court finally signed its death certificate in *Warden* v. *Hayden*, 387 U.S. 294 (1967). See also Snee & Hogan, The McNabb-Mallory Rule: Its Rise, Rationale and Rescue, 47 Geo. L. J. 1 (1958) for the strange judicial history of the rule of *McNabb* v. *United States*, 318 U.S. 332 (1943), which was interpreted almost out of existence until this Court announced, in *Mallory* v. *United States*, 354 U.S. 449 (1957), that it had meant what it said in *McNabb*.

[7] Indeed, even the same Circuits will reach different results in virtually the same legal situations. Compare, for example, the opinion below in the instant case with the decisions of the very same Court of Appeals in such cases as: *United States* v. *Sansone*, 206 F.2d 86 (2d Cir. 1953); *United States* v. *Birnbaum*, 337 F.2d 490 (2d Cir. 1964).

One example from this case should suffice to show the importance of the issue we present. In July of 1969, numerous films were seized by the authorities in Baltimore, and both petitioner's co-defendant Portella and one James Kelly, the purchaser of the films, were arrested. After their arraignment in state court, Portela told Kelly, according to the latter's testimony, that petitioner was the source of the films.[8] The court below found no error in the admission of this testimony, stating that:

> Portela told Kelly in that same conversation that he intended to continue in the pornography business. In this context, his mention of Marti may well have been to persuade Kelly to continue to deal with the conspirators, despite their arrests.

Despite this attempted justification for the admission of such devastating testimony against one who could not meaningfully cross-examine it, the record is clear that Kelly had never met petitioner and neither knew him nor of him. Indeed, petitioner's real name was never used in the conversation (if, indeed, that conversation ever actually took place),[9] Portela using a nickname when referring to peti-

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[8] These films constituted the basis for the sole substantive count upon which petitioner was convicted. A finding of guilt on this count must surely have lead the jury to infer guilt on the conspiracy count.

[9] Since Portela never testified, petitioner had no opportunity to cross-examine the truthfulness of the statement, if made, or to inquire of Portela whether he ever made it. Perhaps one might safely assume the making of the statement if Kelly were a law enforcement officer who, when dealing with Portela, had assumed an undercover role. See *McCray* v. *Illinois*, 386 U.S. 300 (1967). Here, however, the witness was a former co-defendant who had turned Government witness. The danger of fabrication is obvious; the need for an opportunity to cross-examine the alleged declarant more obvious still; and the prejudice in admitting the testimony, in the absence of the right to cross-examine, most obvious of all.

tioner. Under these circumstances, it is not very easy to see how the statement attributed to Portela could possibly have further conspiracy.

The scope of the "co-conspirator's declaration" exception to the hearsay rule is measured by the "furtherance" requirement—that much is clear. But what the decisions of those courts which deal with the issue have left most unclear is what test must be used in determining when a statement furthers a conspiracy. The test apparently applied by the court below (i.e., whether there is any conceivable theory upon which it could be said that the statement "may well have" furthered the conspiracy), permits the exception to swallow not only the rule, but the Confrontation Clause as well.

We seek the chance to urge upon this Court the proposition that if that exception to the hearsay rule may constitutionally co-exist with the Sixth Amendment,[10] it can do so only under certain restrictions. One of them, we submit, is a judicial recognition, at long last, that a statement furthers a conspiracy only when it is reasonable to believe that its utterance would probably have been authorized and approved by the other conspirators, had they been consulted about it. Only such a restriction pays respect to the traditional agency principles upon which the exception is ostensibly based.[11]

3. The Government, in any obscenity prosecution, must prove beyond a reasonable doubt that the material "affronts contemporary community standards relating to the

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[10] That precise question was recently thought to be before this Court in *Bostic* v. *United States,* 424 F. 2d 951 (6th Cir. 1970), *cert. granted,* 400 U.S. 91 (1971). However, certiorari was dismissed as improvidently granted at 402 U.S. 547 (1971).

[11] Should this Court decline to reach the Sixth Amendment question posed, petitioner respectfully requests that it consider the issue as one involving its supervisory powers over the administration of federal criminal justice.

description or representation of sexual matters . . . ." *Memoirs* v. *Massachusetts,* 383 U.S. 413 (1966). And it cannot be gainsaid, as the Court of Appeals conceded,[12] that those charged with transporting obscenity have a right to prove what those community standards are, in an effort to show that the material on trial falls within those standards. As Mr. Justice Harlan observed in *Smith* v. *California,* 361 U.S. 147, 171-72 (1959):

> The community cannot, where liberty of speech and press are at issue, condemn that which it generally tolerates. This being so, it follows that due process . . . requires a State to allow a litigant in some manner to introduce proof on this score.

Here, no such proof was allowed.

During trial, petitioner and his co-defendants made numerous attempts to show the jury, on the issue of contemporary community standards, that films and magazines similar or identical to those for the transportation of which they were then being tried were freely available to the public in various portions of the United States. Among the places mentioned in the offer of proof were: New York City[13]; Baltimore; Philadelphia; San Francisco, San Diego, Los Angeles; Chicago; Cleveland; Dayton; Buffalo; Cincinnati; Albany; Syracuse; Providence; Boston; Indianapolis; St. Louis; Kansas City (Missouri); Memphis; Miami; Charleston (West Virginia) and Minneapolis.

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[12] See *infra,* page A17.

[13] Responding to a defense offer to show that identical films could be freely purchased in New York City, the trial court stated:

> I could walk up to 42nd Street and buy any of the stuff that has been shown. There isn't any doubt about it.

The trial court rejected all such offers, on the basic ground that proof as to what was acceptable in "the larger Metropolitan cities or areas of the United States" was insufficient to establish a "national" community standard.[14] The Court of Appeals held that the offers of proof were properly rejected, stating:

> Evidence of mere availability of similar materials is not by itself sufficiently probative of community standards to be admissible in the absence of proof that the material enjoys a reasonable degree of community acceptance. . . . Such proof would normally be supplied by expert witnesses. No such proof was offered. In the absence of this foundation, the allegedly similar pornographic material was properly excluded.[15]

Two important questions under the First and Fifth Amendments are thus raised by this petition:

a) The first is whether a defendant in an obscenity case may introduce proof that similar or identical items are freely available in major metropolitan areas throughout

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[14] Thus, in rejecting an offer to show the jury similar magazines and films which had been openly purchased in Los Angeles, the trial court stated that:

> I don't think it [Los Angeles] sets the standard. Because they might be tolerable in Los Angeles doesn't mean they are tolerable country-wide.

[15] We note, however, that included in the offer were films showing in regular motion picture theatres in many cities throughout the country. This, we submit, was in itself a "sufficient showing" that the films being exhibited enjoyed a "reasonable degree of community acceptance," thus obviating the jury's endurance of a battle of the experts. We note further that according to the 1960 census the total population of the cities mentioned to the trial court is 24,550,332. No doubt the population was higher at time of trial. And if the metropolitan areas of those cities be considered, the figure would be higher by millions.

the country without showing further that they are also available in other, non-urban, areas. The trial court, without correction by the Court of Appeals, implicitly held that a defendant could not do so. That ruling, if followed elsewhere, will place intolerable burdens upon the exercise of First Amendment rights. Few indeed are the defendants with financial resources sufficient to make such a showing, even in those situations where one can be made. Moreover, to require a showing that items accepted in St. Louis, Syracuse and San Diego are also tolerated in Sandusky, Shelby and Shrewsbury woefully misconstrues the law. As Mr. Justice Harlan noted in *Manual Enterprises, Inc.* v. *Day,* 370 U.S. 478, 488 (1962), this Court has found intolerable the:

> consequence of denying some sections of the country access to material, there deemed acceptable, which in others might be considered offensive to prevailing standards of decency.

b) The second question is whether proof of free availability of similar or identical material in numerous metropolitan areas through the country is admissible in the absence of expert testimony that it enjoys a reasonable degree of community acceptance. The Court of Appeals held that it is not,[16] and thus placed another intolerable

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[16] The paragraph in which the Court of Appeals stated that the defense should have offered expert testimony is followed by one in which it approved the rejection of the Report of the Presidential Commission on Obscenity and Pornography. See *infra,* page A18. That Report was written by those who would clearly have qualified as experts, had they been called by the defense, thus obviating the obvious hearsay objection. Another ground of rejection was that the expert opinions contained in the Report would have usurped the function of the jury. If this reasoning is correct, would it not also apply to expert testimony at trial? It, too, would "usurp" the function of the jury.

burden upon the exercise of First Amendment rights—a burden, like the first, so difficult to bear and so unnecessary, that it violates due process rights to a fair trial. The facts spelled out in the offer (including the allegation that similar or identical films were being regularly shown in advertised movie theatres in numerous cities) were by themselves a sufficient indicia of a "reasonable degree of community acceptance." It then became the burden of the Government either (1) to show by an offer of counter-proof that the material should not be exhibited or, (2) once it was exhibited, to try by appropriate proof to convince the jury that, despite its free availability, the material either (i) was not indicative of what the community tolerates or (ii) was not similar to the material on trial.[17] The Government never attempted to do the former; the trial court's ruling made unnecessary any attempt to do the latter. We submit that that burden was assumed by the Government when petitioner was indicted and that First Amendment values make it imperative that this Court force the Government to live up to it. The Government is free to call experts if it so chooses, but to require the defense to do so is to shift the burden of proof on the issue of contemporary community standards and to ensure that none but the wealthy de-

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[17] At trial, the judge viewed with counsel a movie, shown at a regular movie theatre, which depicted the type of sex acts portrayed in the films on trial. He declined, over objection, to allow the jury to see that same film, on the ground that it was not sufficiently similar to warrant showing it to the jury. Normally, it is the trial judge who makes such a determination of a preliminary fact upon which the admissibility of evidence depends. This Court may wish to consider, however, whether that normal rule should apply without restriction in cases involving the exquisite vagueness of the obscenity concept. What is found by the judge to be dissimilar may well be found by a jury to be a dead ringer for the items upon which it must render its verdict.

fendant will be able to afford to present such a defense to an obscenity charge.

CONCLUSION

For the foregoing reasons,[18] the writ of certiorari prayed for should be granted.

Respectfully submitted,

PATRICK M. WALL
36 West 44th Street
New York, N. Y. 10036
(212) 986-6688
Counsel to Petitioner

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[18] Petitioner also adopts so much of the reasons advanced in the petitions of his co-appellants as may be applicable to him. Those co-appellants are: Richard Portela (petition filed on August 6, 1971); Ferris Jacob Alexander (petition filed on September 14, 1971); Samuel F. Manarite (petition filed on August 6, 1971 [No. 71-5215])

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS
For the Second Circuit

No. [illegible]—September Term, 1971.

(Argued May 4, 1971 Decided July 7, 1971.)

Docket Nos. [illegible]

United States of America,

—v.—

Appellee

Samuel F. Mac[illegible], Bureau Printing, Inc. Mary Ferris Jane [illegible] and [illegible],

Intervenor-Appellants

Before:

[illegible], Smith and Mulligan,

Circuit Judges.

Defendants appeal from judgments of conviction in the Southern District for violation of 18 U.S.C. 1461 and 18 U.S.C. § 371, transportation and conspiracy to transport obscene material in interstate commerce. Lloyd F. MacMahon, J., and a jury.

Affirmed.

Richard E. Lerner, Trial Attorney, Department of Justice, Washington, D. C. (William Norris Stevens, Jr., United States Attorney for the Southern District of New York, New York, New York, of counsel), for the appellee United States of America.

William S. Kunstler, New York, New York, for defendant-appellant Samuel Mac[illegible]

JAMES M. LA ROSA, New York, New York (Gerald L. Shargel, New York, New York, of counsel), *for defendant-appellant Richard Portela.*

PATRICK M. WALL, New York, New York, *for defendant-appellant Luis Marti.*

HERALD PRICE FAHRINGER, Buffalo, New York (Lipsitz, Green, Fahringer, Roll, Schuller and James, Buffalo, New York and Robert Millavetz, Minneapolis, Minnesota, of counsel), *for defendant-appellant Ferris Jacob Alexander.*

MICHAEL P. DIBENZO, New York, New York, *on behalf of defendant-appellant Dominick Constantino.*

LUMBARD, *Circuit Judge:*

Samuel F. Manarite, Richard Portela, Luis Marti, Ferris Alexander and Dominick Constantino appeal from judgments of conviction following a 15-day trial in the Southern District of New York before Hon. Lloyd F. MacMahon, which resulted in jury verdicts against them on October 28, 1970. The appellants were all convicted of conspiracy under 18 U.S.C. § 371 to violate 18 U.S.C. § 1465 (transportation in interstate commerce of obscene material for purpose of sale or distribution) and on other counts of the 13 count indictment which charged substantive violations of § 1465.[1]

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[1] 18 U.S.C. §1465 provides in part:

"Whoever knowingly transports in interstate . . . commerce for the purpose of sale or distribution any obscene . . . book . . . or any other matter of indecent or immoral character, shall be fined not more than $5000 or imprisoned not more than five years, or both.

"The transportation as aforesaid of two or more copies of any publication [or article] . . . of the character described above, or a combined total of five such publications and articles, shall create a presumption that such publications or articles are intended for sale or distribution, but such presumption shall be rebuttable. . . ."

Manarite was sentenced to eighteen months in prison, and fined $5,000; Portela was sentenced to three years in prison and fined $30,000; Marti to two years in prison and fined $15,000; Portela to three years in prison and fined $30,000; Constantino received a year and a day and a $5,000 fine, while Alexander was sent to prison for eighteen months and fined $20,000; and Constantino received a year and a day and was fined $5,000.[2]

The appellants assert numerous claims of error which we treat as follows:

I. The Sufficiency of the Evidence

II. Alleged Errors Involving Admission of Evidence Relating to Extrajudicial Statements of Co-Conspirators

III. Alleged Errors Relating to the Determination as to the Pornographic Nature of the Material

IV. Evidence Seized Incident to Portella's Arrest

V. Use of Hearsay Evidence Before the Grand Jury

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[2] Alexander and Portela were convicted on Counts Seven and Ten (relating to transportation between New York and Minneapolis of 10,000 copies of "Adam and Eve" and "Kiss it Hard" magazines, respectively). Portela was also convicted on Count Twelve (relating to transportation of 1,000 copies of "Color Climax" magazine from New York to Baltimore) and, along with Marti, on Count Thirteen (transportation of certain films from New York to Baltimore). Three defendants were acquitted in all respects: Salvatore Puntasecca, Max Bornstein and Carol Portela, wife of appellant Richard Portela. References to "Portela" unless otherwise indicated are to Richard Portela.

VI. Constitutionality of § 1465

As we find that there was more than ample evidence to support the convictions, and no reversible error in the conduct of the trial, we affirm the convictions.

I.

The Sufficiency of the Evidence

During the three week trial, the government advanced abundant evidence from which the jury could find that the appellants were guilty of the conspiracy, as charged, to produce hard core pornography in New York and distribute it to various cities, including Richmond, Philadelphia, Minneapolis, Cleveland, Washington, D. C., Chicago and Baltimore, and of the substantive offenses of which they were convicted. The evidence, which included testimony by four witnesses who were active participants, may be summarized as follows: Films were produced in Manhattan by Marti, who owned a shop known as the "Camera Eye" located at 12 West 21st Street, and the magazines and other printed matter were produced by Phil Frimet, the owner of "Anchor Litho" printing shop on 12th Street, in Manhattan, with the exception of one magazine which Frimet arranged for a sub-contractor to print. Frimet testified fully as to the nature of his activities. Portela distributed the material thus produced and employed various persons to assist him in this operation. Bruce Valentine and Frank Del Rosso testified at length as to trips which they made alone or

with other co-conspirators for the purpose of selling and delivering the material in question for Portela and Marti. Manarite was the financier of the group. Alexander was a Minneapolis dealer who purchased material from Portela and Marti, and caused it to be transported in interstate commerce for commercial distribution.

The events recounted at the trial began in September or October, 1968, with the purchase by Frimet of "Anchor Litho." Initially, Frimet produced obscene playing cards which were purchased by Portela and defendant Paul Wolf.[3] Constantino picked up these cards from Frimet on behalf of Portela and Wolf. In December, 1968, Portela engaged Bruce Valentine to assist him in distributing the material which he was ordering from Frimet and Marti. Portela and Valentine went to Philadelphia and Baltimore for the purpose of selling "Action," an obscene magazine printed by Frimet. Soon thereafter, Portela and Valentine went to Cleveland to sell certain hard core films which Constantino had transported to that city. During this trip, Portela told Valentine that Marti was the only producer of hard core films in Manhattan. Then, in February, Valentine and Constantino only, made a third trip to Baltimore and Philadelphia, for the purpose of selling films, playing cards and books. Valentine described the material as consisting of depictions of men and women engaged in sexual activities, apparently similar to the mass of materials admitted into evidence.

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[3] Prior to trial upon the government's motion, the case was severed as to six defendants, and of these Phil Frimet and Frank Del Rosso pleaded guilty to the conspiracy count and testified as government witnesses.

In January, 1969, Ferris Alexander,[4] came to New York from Mineapolis and ordered some had core materials from Portela, and Portela told Alexander that he would send him these materials. In February, Valentine and Carol Portela drove to Minneapolis with a U-Haul trailer and delivered 10,000 copies of "Adam and Eve" magazine, another Frimet production. Valentine picked up the material in Manhattan at the Casco Bindery, an establishment owned by one Herb Goldwasser, assisted by Constantino, Frimet, Bornstein, Portela and Wolf. Subsequently, in March, 1969, Valentine delivered an additional 10,000 copies of "Adam and Eve" to Alexander and in April 10,000 copies of "Kiss it Hard," still another product of the Frimet establishment, were delivered, part of a run of 30,000 copies of that title printed in April.[5] On the last occasion Alexander gave Valentine about one thousand films with which he was dissatisfied and asked that they be returned to Portela for credit. When Valentine gave these films to Portela, Portela said that the films came from Marti and not from him. The next day, Portela told Valen-

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[4] Unless otherwise indicated "Alexander" refers to the appellant Ferris Alexander. His brother, Edward Alexander, was named as a co-defendant but his trial was severed from that of the appellants.

[5] On the basis of this evidence, the jury could have concluded that Alexander ordered the material (or at least encouraged Portela to bring it to him on approval) before the material was in fact brought into the state and thus the evidence was clearly sufficient as to the convictions of Alexander (as well as Portela) on Counts Seven and Ten relating to the March and April trips to Minneapolis respectively. We have no occasion to consider the application of § 1465 to cases where a person has no connection with those transporting material in interstate commerce until after the material was brought into the state. Cf. *Rewis* v. *United States*, 401 U.S. —— (April 5, 1971).

tine that he was flying to Minneapolis with Bob Shuttlesworth, Marti's bookkeeper, to settle the matter.

Additional copies of various issues of "Kiss it Hard" were sold by Frimet and Constantino during a sales trip to Baltimore. "Kiss it Hard" unlike other magazines printed by Frimet, was produced on a partnership basis with Portela. In other cases, Portela and Wolf paid Frimet in cash.

In April, 1969, Del Rosso was engaged by Portela to assist in delivering pornographic materials. Del Rosso testified that, in persuading him to do this work, Portela told Del Rosso that Lou Marti was Portela's supplier of films. That same month, Del Rosso and one Owen Osterman rented a U-Haul and a truck for a sales trip to Baltimore, Washington, D. C., Philadelphia and Virginia. Among the items sold on this trip was "Adam and Eve." Del Rosso went to "Camera Eye" where Marti gave him additional books and magazines for the trip which he was about to undertake. In any event, Portela told Del Rosso that all sales made on his trip should be made on a cash basis if possible, and otherwise checks were to be made out to Lou Marti's "Camera Eye." Subsequently, Del Rosso made a sales trip to Minneapolis.

At about this time, Valentine spoke to Marti about purchasing films from him which he said he would try to sell in Baltimore. Marti refused to sell films to Valentine for this purpose on the ground that he sold his films in Baltimore through Portela. However, Marti agreed to let Valentine purchase films for resale in Chicago, and supplied Valentine with a list of possible sales prospects in that city.

In late May, James Kelly,[6] who had just opened a book store in Baltimore, came to New York and purchased from Portela obscene playing cards, "Kiss it Hard" and "Tiny Tim," another magazine produced for Portela and Wolf by Frimet. A few days later Portela delivered some color film to Kelly in Baltimore. Shortly thereafter about 1,000 copies of "Color Climax" were sold to Kelly by Portela and they were delivered to Kelly by Manarite who fixed the price to be paid.

On June 25, the Baltimore police raided Kelly's shop and seized various obscene articles pursuant to a warrant. Copies of "Color Climax," "Kiss it Hard" and "Tiny Tim" were among the publications seized in this June 25 raid. Thereafter, Portela contacted Kelly by telephone and asked him if he wanted any new films. Kelly replied in the affirmative and then contacted the F.B.I. Portela registered in the Baltimore Holiday Inn under the alias "Nick Devito" where Kelly came to meet him on July 12. After two boxes of obscene films were transferred to Kelly's car, the Baltimore police arrested both Portela and Kelly, along with several others, and seized the films. Portela told Kelly over coffee after they had been released on bail, that Lou Marti supplied most of the films which had been the cause of their arrest, while a few films had come from one Lou Saks.

On July 23, Carol and Richard Portela were arrested in their apartment in Rego Park, New York, pursuant to a warrant issued by a United States Commissioner, on complaint of an F.B.I. agent. Hard core pornographic materials

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[6] Kelley was indicted as a co-conspirator. His trial was severed and he testified for the government.

were seized, along with a tear gas gun, a .32 caliber gun and various other items. Thereafter the appellants were indicted on October 27, 1969.

The magazines, playing cards, and films distributed by the conspirators were introduced in evidence. These materials graphically depict nude (or virtually nude) men and women, men and men and women and women engaged in various sexual acts, including sexual intercourse, fellatio, cunnilingus, sodomy and the like in numerous permutations and combinations. No attempt was made, or could be made, to suggest that any of this material constitutes instructional material on sexual technique, that it documents sex habits or that it has any social value. The evidence shows that the appellants themselves referred to this material as "hard core pornography," which is all that it is.[7]

Sufficiency of the Evidence

There was ample evidence to support the conviction of each of the appellants of each of the counts of which they were convicted.

Alexander argues that even if on two isolated occasions he may have committed substantive violations of § 1465, there is no proof that he was involved in a conspiracy to violate that section, or at least he was not proved to be part of the conspiracy charged. We do not agree. The conspiracy here shown was of the type sometimes referred to as a "wheel conspiracy" in that members of

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[7] See Mr. Justice Stewart's definition of the term "hard core pornography" in his opinion in *Ginzberg* v. *United States*, 383 U.S. 463, 499 n. 3 (1966).

a "core" group deal with a number of contacts who are analogized to the spokes of a wheel and are connected with each other only through the core conspirators. In such conspiracies, whether the spoke participants may be found to be members along with the core conspirators depends on whether or not the "spokes" knew or had reason to know of the existence, but not necessarily the identity, of one or more of the other spoke participants in the wheel conspiracy. Compare *United States* v. *Kotteakos,* 328 U.S. 750 (1946) with *United States* v. *Blumenthal,* 332 U.S. 539, 559 (1947).[8] See also *United States* v. *Andolschek,* 142 F.2d 503, 507 (2d Cir. 1944).

On this record it is obvious that Alexander must have known that this material which was delivered to him in quantities of 10,000 copies at a time was also being distributed to other dealers. He visited Portela in New York and must have been aware of the nature and extent of the conspiracy and its operation. See *United States* v. *Aiken,* 373 F.2d 294 (2d Cir. 1967), cert. denied, 389 U.S. 833 (1967).

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[8] In *Kotteakos,* the convictions of persons accused of conspiracy to violate the National Housing Act were reversed because the only connection between the various persons involved was that each had made fraudulent applications to the same broker. However, in *Blumenthal,* the Supreme Court affirmed the convictions of salesmen involved in the illegal sale of liquor on the theory that each was "aiding in a larger plan."

II.

Alledged Errors Involving Admission of Evidence Relating to Extrajudicial Statements of Co-Conspirators

Lou Marti argues that many of the statements admitted under the co-conspirator exception to the hearsay rule were improperly admitted. The testimony challenged includes the following:

(1) Valentine's testimony that Portela told Valentine that Marti had been the seller of certain films which were returned by Alexander to Portela via Valentine.

(2) Valentine's testimony that Portela told Valentine when they drove to "Camera Eye" that Portela was going to go into the shop to order films from Lou Marti.

(3) Agent McShane's testimony that Portela had an argument with Wolf during which Portela said that they should "let Lou Marti settle this."

(4) Del Rosso's testimony that Portela told Del Rosso that Portela obtained films from Marti.

(5) Valentine's testimony relating to his conversation with Marti wherein Valentine sought to purchase films for sale in Baltimore was rebuffed on the grounds that Portela sold Marti's films in Baltimore, but then was sold films for resale in Chicago and given a list of possible customers.

(6) Kelly's testimony that after he and Portela were arrested, Portela told Kelly that Portela obtained films from "Poncho" [Marti].

(7) Valentine's testimony that Portela told Valentine that Marti was the only producer of hard core films in Manhattan.

Also challenged as not within the scope of the conspiracy is Valentine's testimony that Portela told him that Manarite was financing the operation. Appellant contends that the above statements should have been excluded as either not in furtherance or not in the course of the conspiracy charged. We do not agree.

Statements of co-conspirators made in furtherance and in the course of a conspiracy are admissible as each of the conspirators is an agent of the other conspirators, and, therefore, such statements are evidence against all those involved in the conspiracy. See *Lutwak* v. *United States*, 344 U.S. 604, 617-18 (1953); *Logan* v. *United States*, 144 U.S. 263 (1892); *United States* v. *Birnbaum*, 337 F.2d 490, 495 (2d Cir. 1964).[9]

The first challenged statement seems clearly to have been within the scope of the conspiracy. Alexander was seeking refunds from Portela on certain films for which Portela felt he was not responsible. It was necessary to clarify responsibility for these films in order to maintain Alexander's continued cooperation, and to do this Portela

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[9] This rule is codified in the proposed Federal Rules of Evidence, Rule 801(d)(2)(v). Proposed Rule 801(d) provides in part:

"(d) Statements Which Are Not Hearsay. A statement is not hearsay if:

(2) *Admission by Party-Opponent.* The statement is offered against a party and is . . . (v) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy."

and Marti's bookkeeper promptly flew to Minneapolis. In order to avoid returning, Portela wanted Valentine to understand that he should not accept such returns. See *United States v. Annunziato*, 293 F.2d 373, 380 (2d Cir. 1961), cert. denied, 368 U.S. 918 (1961).

Similarly, the second challenged statement, relating to Portela's intent to buy films from Marti, made as Portela was about to go to the "Camera Eye," could be interpreted to be an attempt by Portela to acquaint Valentine with the practice of the conspirators so that Valentine would conform thereto.

The third statement, Portela's suggestion that they let Lou Marti settle their dispute, is clearly in furtherance of the conspiracy because it was an attempt to find a means to insure its continuance in the face of a serious disagreement between two of the key figures.

Number four, Portela's statement to Del Rosso that Lou Marti supplied the films could be considered as an inducement for Del Rosso to enter the conspiracy.

As to number five, Marti's statement that Valentine couldn't sell in Baltimore because that was Portela's territory obviously was in furtherance of the main conspiracy and was admissible on that basis regardless of whether Marti and Valentine had entered into any separate conspiracy. The fact that Marti agreed to allow Valentine to sell his films in Chicago and to furnish a list of possible customers in that city in addition to suggesting that Marti had a stake in Valentine's venture, is not itself hearsay, since offered to prove the fact of agreement rather than the truth of any assertion relating to past or future agreement. Similarly, the testimony regarding possible

purchasers in Chicago was clearly in furtherance of the conspiracy.

The sixth item, relating to Portela's statement that Marti was the only producer of hard core films in Manhattan, may well have been made in order to emphasize to Valentine the importance of Marti to the operation. Valentine, who previously had held Marti up at gun point, had not in the past shown proper deference to someone so important to the functioning of the conspiracy, and the jury might infer that Portela wished to avoid any repetition of this sort of conduct insofar as Marti was concerned.

Portela's identification of Marti as the supplier of the films seized in the July 12 shipment to Baltimore was made to Kelly after they both had been arrested and then released from custody. However, their arrest did not necessarily terminate the conspiracy. *United States* v. *Agueci*, 310 F.2d 817, 838-39 (2 Cir. 1962), cert. denied, 372 U.S. 959 (1963). Portela told Kelly in that same conversation that he intended to continue in the pornography business. In this context, his mention of Marti may well have been to persuade Kelly to continue to deal with the conspirators, despite their arrests.

As to Portela's remark to Valentine that Manarite was financing the operation, this could have been for the purpose of suggesting to Valentine the need to show deference to certain figures in the conspiracy, in this case to Manarite, whom he was about to meet.

We find no error in the admission of this evidence.

III.

Alleged Errors Relating to the Determination of the Court and Jury as to the Ponographic Nature of the Material

The claims of the appellants relating to alleged errors in the Court's charge on obscenity, and the admissibility of certain evidence sought to be introduced on the issue of contemporary community standards, have an unreal quality in the light of the nature of the material described, and in the light of the use of the term "hard core" by the conspirators themselves in describing the material. In any event, the contentions of the appellants in this respect are entirely without merit.

Charge on the Elements of Obscenity

The Court, in charging the jury on the elements of obscenity, properly stated the applicable law. See *United States* v. *Roth,* 354 U.S. 476 (1957); *Memoirs* v. *Massachusetts,* 383 U.S. 413 (1966); *Redrup* v. *United States,* 386 U.S. 767 (1967); *Jacobellis* v. *Ohio,* 378 U.S. 184 (1964); *Mishkin* v. *New York,* 383 U.S. 502 (1966). The appellants, however, challenge two portions of the charge. The first portion challenged dealt with the determination of community standards:

> "In determining the common conscience of the community, you are to consider the community as a whole, young and old, educated and uneducated, the religious and irreligious, men, women, and children, from all walks of life, in all sections of the country."

We find no error in this charge. It makes it clear that the community as a whole is to be considered in deter-

mining what its standards are. It does not put any undue emphasis on the fact that children are part of this community. See *Butler* v. *Michigan,* 352 U.S. 380 (1957).[10]

A second portion of the charge complained of related to the small percentage of the material which might be deemed as appealing to persons with deviant sexual interests. The Court, after dealing with the general requirement that in order to be obscene, material must have prurient appeal, stated:

> "Some of the material charged as obscene deals with sexual conduct that deviates from normal heterosexual conduct, such as lesbianism and homosexuality. Where the material is designed for a clearly defined deviate sexual group rather than to the public at large, the prurient appeal requirement is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group" (R. 1927).

It is claimed that this charge is deficient in that it fails to state that the special rule charged is applicable only if there is independent proof that the material was designed for and primarily disseminated to a clearly defined sexual group. This claim is without merit. Under *United States* v. *Mishkin, supra,* this variation of the prurient interest requirement applies where the "probable recipient group"

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[10] This charge puts slightly less emphasis on children in defining the nature of the community than did the charge in *Roth* v. *United States, supra,* which stated that:

> "[t]he community as a whole is the proper consideration. In this community, our society, we have children of all ages, psychotics, feeble minded and other susceptible elements. Just as they cannot set the pace for the average adult reader's taste, they cannot be overlooked as part of the community."

See *Ginzberg* v. *United States,* 383 U.S. 463, 465, n. 3 (1966).

consists of deviates. This would surely be true whenever, in the words of the charge "the material is designed for a clearly defined deviate sexual group."

Exclusion From Evidence of Comparable Material Offered on the Issue of Community Standards

The appellants sought to introduce evidence supposedly relevant on the issue of community standards. This evidence included materials purchased in Los Angeles which the defendants offered to prove were also available in other major metropolitan areas, material purchased in New York City, films showing in New York City and the Report of the Commission on Obscenity and Pornography.

The appellants do not contest that under *United States* v. *Wild,* 422 F.2d 34 (2d Cir. 1969), cert. denied, —— U.S. —— (May 17, 1971), it was not necessary for the government to introduce evidence on the issue of community standards in view of the "hard core" nature of the materials.

Of course, the appellants had the right to introduce evidence on community standards. The question is whether the evidence offered by the appellants was proper evidence on this issue. We conclude, as did the trial Court, that it was not.

Evidence of mere availability of similar materials is not by itself sufficiently probative of community standards to be admissible in the absence of proof that the material enjoys a reasonable degree of community acceptance. *Womack* v. *United States,* 294 F.2d 204, 206 (D.C. Cir. 1961), cert. denied, 365 U.S. 859 (1961). Such proof would normally be supplied by expert witnesses. No such proof

was offered. In the absence of this foundation, the allegedly similar pornographic material was properly excluded. Mere availability of similar material by itself means nothing more than that other persons are engaged in similar activities.

As to the Report of the Commission on Obscenity and Pornography, it was properly excluded as in large part irrelevant and as usurping the function of the jury. Introduction of such material is not a proper substitute for the testimony of expert witnesses whose opinions can be tested by appropriate cross examination.

IV.

Evidence Seized Incident to Portela's Arrest

Portela challenges the admission into evidence of certain items seized in his apartment on July 23, 1969, when he was arrested there pursuant to a warrant. His sole challenge to this search is that it was not conducted in accordance with the restrictive standards of *Chimel* v. *California,* 395 U.S. 752 (1969), decided one month earlier. We are in full agreement with Judge MacMahon's opinion denying Portela's motion to suppress this evidence. See *United States* v. *Manarite,* 314 F. Supp. 607, 613-16 (S.D.N.Y. 1970). A tear gas gun, a bag containing photographs and a bag containing ammunition was found in a bar within six inches of where Portela was standing at the time they were seized. Two address books and a bag containing what Portela described as "hard core" film was found on the

bar. Additional matter including a gun and .32 caliber ammunition was found in closets to which the agents went at the request of Mrs. Portela to get for her a dress and a raincoat. Other material, including Western Union money order receipts and copies of "Color Climax" were found near an end table near which several unidentified persons were standing. The F.B.I. agents were justified in assuming that these persons might be accomplices of those arrested and hence might attempt to destroy evidence or procure a weapon on behalf of appellants. This was an obvious possibility in view of the fact that a gun had already been found on the premises. Thus, as Judge MacMahon found, the search and seizure incident to the July 23 arrest were entirely within the scope of *Chimel.*

V.

Use of Hearsay Evidence by the Grand Jury

The indictment herein is challenged on the ground that it was based in part on hearsay testimony. The grand jury was shown the magazines and other printed material involved in this case, but was not shown the movies. Appellants' contention that the jury should have viewed some or all of the hundreds of films involved in this case is entirely unwarranted especially in view of the fact that the content of the films was described to them in competent testimony. See *Costello* v. *United States,* 350 U.S. 359, 363 (1956). There was no reason for the grand jury to view the films. They had a sufficient description of them and could call for their display if they felt it necessary to do so.

VI.

Constitutionality of §1465

The appellants claim that, on its face, or as applied, §1465 is unconstitutional, citing *Stanley* v. *Georgia,* 394 U.S. 557 (1969). However, the Supreme Court in *United States* v. *Reidel,* U.S. (May 3, 1971), upheld the constitutionality of §1461 which forbids the mailing of pornographic material. The Supreme Court held that under *Roth* v. *United States, supra,* obscene materials are not protected by the first amendment, and that the limited right to receive pornography established by *Stanley* did not establish a corresponding right to sell such materials. *A fortiori,* it follows that §1465, which specifically requires that the transportation in interstate commerce be "for the purpose of sale or distribution," is also constitutional.

Alexander also claims that §1465 is unconstitutional because of the provision contained therein that the transportation of two or more copies of any publication or article or a combined total of five such publications or articles creates a presumption that such articles are intended for sale or distribution. Such a presumption is clearly valid as applied to this case where each delivery involved large numbers of magazines and/or films, usually in the thousands.

We have considered the other arguments raised by appellants and find them to be without merit.

The judgments appealed from are affirmed.

APPENDIX B

Judgment and Commitment of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventh day of July, one thousand nine hundred and seventy-one.

Present:

HON. IRVING R. KAUFMAN,
HON. J. EDWIN LUMBARD,
HON. J. JOSEPH SMITH,

Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

SAMUEL F. MANARITE, et al.,

Defendants,

SAMUEL F. MANARITE, LUIS MARTI, RICHARD J. PORTELLA, DOMINIC CONSTANTINO and FERRIS JACOB ALEXANDER,

Defendants-Appellants.

Appendix B—Judgment and Commitment of the United States Court of Appeals

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO
Clerk

By VINCENT A. CARLIN
Chief Deputy Clerk

APPENDIX C

Order of the United States Circuit Court of Appeals denying Petition for Rehearing

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

DOCKET NOS. 35606, 71-1014, 71-1045-46-47

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

SAMUEL F. MANARITE, et al.,

Defendants,

SAMUEL F. MANARITE, LUIS MARTI, RICHARD J. PORTELLA, DOMINIC CONSTANTINO and FERRIS JACOB ALEXANDER,

Defendants-Appellants.

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant, Luis Marti, and no active circuit judge having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

Dated: August 18, 1971

PAUL R. HAYS,
Acting Chief Judge

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-381

FERRIS ALEXANDER, PETITIONER

v.

UNITED STATES OF AMERICA

No. 71-396

LUIS MARTI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Following a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted of conspiring to violate 18 U.S.C. 1465 by transporting obscene material interstate for the purpose of sale or distribution. In addi-

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tion, both petitioners were convicted of substantive violations of the statute—petitioner Marti for transporting 1,000 reels of obscene film from New York City to Baltimore, Maryland, and petitioner Alexander for the transportation of 10,000 copies of obscene magazines on two separate occasions. Petitioner Marti was sentenced to two concurrent terms of two years' imprisonment and fined a total of $15,000. Petitioner Alexander was sentenced to three concurrent terms of eighteen months' imprisonment and fined a total of $20,000. The court of appeals affirmed (App. A in both petitions).

1. The evidence revealed that petitioners participated in an enterprise engaged in the production and distribution of obscene material.[1] The material included magazines, films and playing cards produced in New York City from November 1968 to October 1969 (Tr. 4–6, 12–28, 37–38, 44–45).[2] Testimony revealed that petitioner Marti was engaged in the conspiracy as the producer of the obscene films (Tr. 156–157, 187–188, 198–199, 207–209, 450–451, 457–458, 462, 475–477, 806–807, 1030). The material produced was then transported to various cities, including Rich-

[1] Two others convicted with petitioners of engaging in the enterprise have also filed petitions for writs of certiorari. See *Portela* v. *United States*, No. 71–184, and *Manarite* v. *United States*, No. 71–5215. In connection with our joint opposition to those petitions (copies of which we are supplying to petitioners) we requested the clerk of the court of appeals to forward the exhibits concerning the obscene material to the Clerk of this Court.

[2] "Tr." refers to the transcript of the proceedings in the district court, a copy of which is on file with the Clerk of this Court in No. 71–5215.

mond, Philadelphia, Baltimore, Minneapolis, Cleveland, Chicago and Washington, D.C. (Tr. 154–159, 161–187, 196–209, 458–459, 461–464, 469–473, 788–790, 792–797, 801–806). Petitioner Alexander was shown to have received several deliveries of this material in Minneapolis, Minnesota (Tr. 159–187, 468–473). The material was distributed under the direction of a co-defendant, Richard Portela (See *e.g.*, Tr. 4, 14–28, 36–41, 149–151, 154–167, 181–184, 196–203, 464–466, 476–477, 788–796, 801–806, 1027–1028), and the operation was financed by another co-defendant, Samuel Manarite (Tr. 214–215, 793–794, 1027–1028).

The government introduced no extrinsic evidence to prove the obscenity of the materials at issue, but rather relied solely on the materials themselves. Petitioners attempted to show that the material did not exceed contemporary community standards and thus was not obscene by offering in evidence allegedly similar materials purchased in various parts of the country, films which were being publicly exhibited,[3] and the *Report of the Commission on Obscenity and Pornography* (Tr. 1266–1270, 1274–1275, 1286, 1295, 1300–1300A, 1302, 1308–1309, 1320–1325, 1328–1329, 1343–1345). The trial court rejected these offers of proof on the ground that the evidence tendered was inappropriate to establish contemporary community standards (Tr. 1270–1273, 1276, 1282, 1288–1290, 1294–

[3] Petitioners at one point also attempted to introduce into evidence newspaper advertisements for films being exhibited in public theaters in an effort to establish community standards (Tr. 1316–1319). At another point, however, it was stated that the newspapers were presented only as demonstrating that the films offered in evidence enjoyed national circulation (Tr. 1340).

1295, 1301, 1314, 1325–1327, 1329, 1331–1332, 1339–1340, 1342, 1344–1345, 1438–1439).

2. Both petitioners claim that the trial judge erred in excluding the proferred evidence regarding contemporary community standards.[4] Petitioner Marti also contends that the indictment was defective because the grand jury had not viewed the films at issue, that the statements of a co-conspirator were not in furtherance of the conspiracy and that the admission of these statements violated his rights under the Confrontation Clause of the Sixth Amendment. Petitioner Alexander also urges that there was insufficient evidence to tie him to the charged conspiracy, that 18 U.S.C. 1465 was improperly applied to him and that various portions of the trial court's charge to the jury were in error.

These contentions, as the court below held, do not merit reversal. The exclusion of the allegedly similar materials was proper because petitioners offered no proof that they enjoyed substantial community acceptance and, standing alone, they were not sufficiently probative of national community standards. The fact that the films were not shown to the grand jury does not warrant reversal and dismissal of the indictment. See *Costello* v. *United States*, 350 U.S. 359, 363–364.[5]

[4] See the government's brief in opposition to the petition for a writ of certiorari in *Miller* v. *United States*, No. 70-43. We are supplying petitioners with copies of the opposition.

[5] Moreover, the grand jury did not act in a vacuum as to the nature of the material involved. As the court of appeals noted, the magazines and other printed material involved in this case were shown to the grand jury. The jurors had a sufficient description of the films and could have called for their display if they thought it necessary to do so.

As found below, the statements of co-conspirators were clearly made in furtherance of the conspiracy; the admission of such statements does not violate the Confrontation Clause of the Sixth Amendment. See *Dutton* v. *Evans*, 400 U.S. 74; *United States* v. *American Radiator & Standard Sanitary Corp.*, 433 F. 2d 174, 194 (C.A. 3), certiorari denied, 401 U.S. 948; *Campbell* v. *United States*, 415 F. 2d 356, 357 (C.A. 6).

While there was no evidence that petitioner Alexander was aware of the identities of the other retailers or of all the details of the scheme, there was ample evidence, as the court of appeals held, from which the jury could infer that Alexander was aware of the nature and extent of the conspiracy. Cf. *Blumenthal* v. *United States*, 332 U.S. 539, 556–559. In addition, the facts revealed that Alexander was more than a mere receiver who was unaware of this material until after it had been brought into the state. Thus, prior to the time any deliveries were made to him, Alexander was seen at a printer's office in New York City with Richard Portela. At that time, Portela introduced Alexander to one of the people who made deliveries and told Alexander that "he had a new line of hard core material that he would be sending out—sending him out samples." (Tr. 171–172). Further, since the evidence revealed that the deliverymen would be given $300 to $500 in expense money, would load thousands of copies of this material on a trailer, and would drive straight through to Minneapolis where they would contact Alexander (Tr. 172–187, 469–473), it was reasonable for the jury to infer that

these deliveries were undertaken in accordance with a preconceived plan agreed to by Alexander and the other conspirators.

Finally, the instructions of the trial court were proper. In instructing on contemporary community standards, no undue emphasis was placed on the fact that children are a part of the community. And the giving of the charge relating to material which might be deemed as appealing to persons with deviant sexual interests, in the absence of independent proof that the material was designed for and primarily disseminated to a clearly defined deviant sexual group, was not error. As this Court held in *Mishkin* v. *New York*, 383 U.S. 502, 509, this variation of the prurient appeal requirement applies whenever the "intended and probable recipient group" consists of deviates. In light of the explicitness of the material involved here, it is clear without independent proof that the "intended and probable recipient group" consisted of those with deviant sexual interests. The instruction on knowledge (set forth in Alexander Pet. 26, n. 9) was equally unobjectionable. This instruction properly conveyed to the jury the idea that knowledge that material is obscene must precede its actual transportation.

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

OCTOBER 1971.

U.S. GOVERNMENT PRINTING OFFICE: 1971

FILED
NOV 5 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-396

LUIS MARTI,

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—v.—

UNITED STATES OF AMERICA

SUPPLEMENTAL MEMORANDUM AND REPLY BRIEF FOR PETITIONER

PATRICK M. WALL
36 West 44th Street
New York, N. Y. 10036
(212) 986-6688
Counsel for Petitioner

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I. Supplemental Memorandum

Our purpose in submitting this Supplemental Memorandum is to call to the attention of the Court that Petitioner has raised, both in the trial court and in the Court of Appeals for the Second Circuit, a question as to the constitutionality, under the First Amendment, of 18 U.S.C. §1465 —an issue similar to one upon which this Court recently granted certiorari in *United States* v. *Onito* (No. 70-69), U.S. (October 13, 1971) (concerning the constitutionality of 18 U.S.C. §1462).

II. Reply Brief

In its Memorandum in Opposition with respect to Petitioner's argument concerning the trial court's exclusion of defense evidence offered on the issue of contemporary community standards, the Government incorporated arguments from its Memorandum in Opposition to the petition for certiorari in *Miller* v. *United States,* No. 70-43.

Normally, we would leave the issues, as already framed, alone. But we cannot resist the temptation to note that, in *Miller,* the Government defended vigorously the trial court's rejection of a defense offer of "expert witnesses to testify that other material was comparable to that before the court and that the comparative material did not go beyond customary limits of candor." Here, of course, the Government is vigorously defending a claim in the court below that such proof had to be put in by means of expert testimony. We submit that it is confusing to have certain courts reject expert testimony on that subject at the same time that other courts are requiring it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

PATRICK M. WALL
36 West 44th Street
New York, N. Y. 10036
(212) 986-6688
Counsel for Petitioner